91-1766

No. 91-_____

FILED
APR 30 1992
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA and FRANK S. ZOLIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: April 30, 1992

QUESTION PRESENTED

Whether the decision of the court of appeals—which conflicts with decisions of this Court and of other courts of appeals—was in error in dismissing petitioner's appeal as moot following compliance by a disinterested third party with an IRS summons enforcement order, although effectual relief remains available to the petitioner through return of the documents and prohibition on any further government use of the documents?

(This question is identical to the question presented in *Church of Scientology of California* v. *United States*, 112 S.Ct. 1261 (March 2, 1992) (pet. for cert. granted) (No. 91-946)).

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.1 LIST

The parties to the proceedings below were:

The Church of Scientology of California
United States of America
Frank S. Zolin

Petitioner Church of Scientology of California has no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1.

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IN THE

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No. 91-____

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA and FRANK S. ZOLIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Church of Scientology of California ("the Church"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The January 31, 1992, order of the court of appeals dismissing the appeal as moot is unreported (1a). The September 4, 1991, order of the district court (2a-3a) is unreported. A prior opinion of the court of appeals (4a-17a) is reported at 809 F.2d 1411. The April 30, 1985, order of the district court (18a-20a) is unreported.[1]

1 Extensive litigation unrelated to the subject matter of this petition followed the opinion of the court of appeals reported at 809 F.2d 1411. *See United States* v. *Zolin*, 832 F.2d 127 (9th Cir. 1987) (granting rehearing *en banc*), 842 F.2d 1135 (9th Cir. 1988) (vacating order

JURISDICTION

The final judgment of the court of appeals was entered on January 31, 1992 (1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2 of the Constitution of the United States provides in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to Controversies to which the United States shall be a party. . . ."

STATEMENT OF THE CASE

1. This petition presents the identical issue raised in *Church of Scientology of California* v. *United States*, 112 S.Ct. 1261 (March 2, 1992) (pet. for cert. granted) (hereinafter cited as "No. 91-946"). The five exhibits that are the subject of this litigation—Exhibits 5-K, 5-L, 5-O, 5-P, and 6-O—were wrongfully converted by Gerald Armstrong, a former adherent of the Scientology religion, in the early 1980's. *See United States* v. *Zolin*, 491 U.S. 554, 557 (1989). These five exhibits, along with thousands of other documents that had been in the custody of the Church either as owner of the property or as bailee for Mr. Hubbard, and which were wrongfully obtained by Armstrong, were eventually

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granting rehearing *en banc*), 850 F.2d 610 (9th Cir. 1988) (Norris, J., concurring in order vacating order granting rehearing *en banc*), *aff'd in part, vacated in part, and remanded*, 491 U.S. 554 (1989), *on remand*, 905 F.2d 1344 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1309 (1991). The unreported order of the court of appeals dismissing as moot the Church's appeal following the orders of the district court on remand from the opinion reported at 905 F.2d 1344 is the subject of *Church of Scientology of California* v. *United States*, 112 S.Ct. 1261 (March 2, 1992) (pet. for cert. granted) (No. 91-946).

ordered placed under seal in the custody of the Los Angeles County Superior Court in *Church of Scientology of California* v. *Armstrong* (No. C420153). *See Zolin*, 491 U.S. at 557. On October 24, 1984, the IRS served the subject summons on the Los Angeles County Clerk, who also serves as the Clerk of the Los Angeles County Superior Court. The summons sought production of thirteen exhibits, including the five exhibits at issue herein and the MCCS tapes at issue in No. 91-946, held under seal in the pending *Armstrong* case. *See id.*

Upon refusal of the County Clerk to produce the summoned documents, the government commenced this proceeding on January 18, 1985, pursuant to 26 U.S.C. §§ 7402, 7602 and 7604, by filing a petition in the district court to enforce the summons. *Zolin*, 491 U.S. at 558. The Church, asserting its own privacy and proprietary interests as owner of the documents at issue, as bailee for the interests and rights of Mr. Hubbard, and as a privilege-holder, intervened in the district court, pursuant to 26 U.S.C. § 7609, to oppose enforcement of the summons on various grounds, including that Exhibits 5-O, 5-P, and 6-O were not relevant to the tax investigation and that Exhibits 5-K and 5-L were protected by the attorney-client privilege (6a-8a, 19a).

On April 30, 1985, the district court enforced the summons as to the five exhibits at issue here, ruling that any privileges had been waived and that the exhibits were relevant to the tax investigation (19a). The district court stayed enforcement of its ruling "for a period of sixty (60) days, and thereafter if an appeal or application for a writ is filed and until the decision on appeal or writ application is rendered" (20a). Both the Church and the government appealed.

2. On February 9, 1987, the court of appeals affirmed the district court's order (4a-17a), including the finding that the five exhibits were relevant to the tax investigation and that any privileges had been waived (6a-8a). The Church sought

no further review of the judgment affirming the order enforcing the summons as to the five exhibits.[2]

3. Although the Church's time to petition this Court for review of the February 9, 1987, judgment of the court of appeals expired on or about May 10, 1987, the government made no effort for over *four* years to obtain the five exhibits that the courts below had ordered produced. Not until June 19, 1991, did the government move in the state superior court for an order allowing the government to examine and copy the five exhibits. On July 25, 1991, the Church filed a motion, pursuant to Fed. R. Civ. P. 60(b)(5), (6), in the district court to vacate the district court's order of April 30, 1985, which had granted the government access to the five exhibits. The Church argued that obviously the government had no actual need for the documents because it had waited for over four years before attempting to obtain them and because both the civil and criminal investigations upon which the summons was based had been formally terminated, and thus there remained no legitimate investigatory purpose for the summons. *See United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); 26 U.S.C. § 7602(a).

On September 4, 1991, the district court entered an order denying the Church's Rule 60(b) motion to vacate the order enforcing the summons with respect to the five exhibits (2a-3a). The district court stated that its April 30, 1985 order, which stayed production "if an appeal or application for a writ is filed and until decision on appeal or writ application is

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2 The government sought review of the court of appeal's affirmance of the district court's order that the MCCS tapes were protected by the attorney-client privilege, which resulted in the litigation set out in n.1, *supra*. Following the denial of the Church's petition for certiorari on March 18, 1991, 111 S.Ct. 1309, the district court ordered that the MCCS tapes be delivered to the IRS. After the district court, the court of appeals and this Court denied the Church's requests for stays pending appeal, the IRS obtained copies of the MCCS tapes from the superior court in late May, 1991. On September 10, 1991, the court of appeals dismissed as moot the Church's appeal from the district court's enforcement order. That proceeding is now before this Court as No. 91-946.

rendered" (20a), "must mean until the mandate is received" (3a), which occurred in January 1991, and that the 1985 order applied to stay production of the five exhibits (3a), even though the Church's time to seek further review of the enforcement order had expired over four years earlier. Petitioner contends that it is inconceivable that the district court would have refused production had the IRS so requested after the Church's time to seek further review had expired in May 1987.

The district court also apparently misunderstood the Church's argument that the IRS no longer had a legitimate investigatory purpose for its summons, as required by *Powell*, *supra*, and 26 U.S.C. § 7602(a). Instead, the court mistakenly found that the Church was contending that the case was now moot because of Mr. Hubbard's death in January 1986 (3a).

4. The Church filed its notice of appeal from the district court's order on September 9, 1991, and sought an emergency stay pending appeal from the court of appeals on September 10, 1991, which was denied on September 19, 1991. On September 13, 1991, the superior court entered an order allowing the government to examine and copy the five exhibits. Sometime after the denial of the motion for a stay, the IRS obtained copies of the five exhibits from the superior court.

On December 19, 1991, the government moved to dismiss as moot the Church's appeal involving the five exhibits, on the ground that the government had already obtained the exhibits. Both the government and the Church contended that the mootness issue herein is identical to the issue involved in the Church's appeal of the order enforcing production of the MCCS tapes, which the court of appeals had dismissed as moot on September 10, 1991. The government argued that the court of appeal's judgment in that appeal controlled the disposition in this matter. The Church asserted that the court of appeals' prior decision was erroneous and that the court

should await this Court's disposition of the Church's pending petition for writ of certiorari in No. 91-946.

On January 31, the court of appeals dismissed the Church's appeal as moot, with no analysis or reasoning other than citation to *United States* v. *Kersting*, 891 F.2d 1407 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 49 (1990), and *United States* v. *Silva & Silva Accountancy Corp.*, 641 F.2d 710 (9th Cir. 1981) (1a). As noted, on March 2, this Court granted the Church's petition in No. 91-946.

REASONS FOR GRANTING THE PETITION

Both parties agree that the issues raised in this petition are identical to the issues raised in No. 91-946, in which the Court has granted the Church's petition for writ of certiorari. Petitioner respectfully requests that the Court postpone decision on the instant petition pending disposition of No. 91-946. Should the Court reverse or vacate the judgment of the court of appeals in that matter, petitioner requests that the Court grant the petition herein, vacate the judgment below, and remand for reconsideration in light of that disposition. *See* R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* 279-80 (6th ed. 1986).[3]

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3 Petitioner respectfully refers the Court to its petition and the briefs it has or will file in No. 91-946 for the merits of its position that its appeal is not moot.

CONCLUSION

For the reasons stated herein, disposition of the petition for a writ of certiorari should be postponed pending this Court's resolution of No. 91-946. Alternatively, the petition should be granted.

Dated: New York, New York
April 30, 1992

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 91-55990, 91-56210
D.C. No. CV85-440-HLH
(Central California)
January 31, 1992

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANK ZOLIN,

Defendant,

and

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Intervenor-Appellant.

Before:

WALLACE, *Chief Judge,*
SNEED and ALARCON, *Circuit Judges.*

ORDER

Appellant's motion for extension of time to oppose the motion to dismiss is granted. Appellee's motion to dismiss these appeals as moot is granted. *See United States* v. *Kersting*, 891 F.2d 1407 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 49 (1990). These appeals are remanded to the district court with directions to vacate its September 6, 1991 order denying appellant's motion for relief pursuant to Fed. R. Civ. P. 60(b). *See United States* v. *Silva & Silva Accountancy Corp.*, 641 F.2d 710 (9th Cir. 1981).

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV85-440-HLH

UNITED STATES OF AMERICA

v.

FRANK S. ZOLIN

CIVIL MINUTES—GENERAL

Date: September 4, 1991

PRESENT: HON. HARRY L. HUPP, *Judge*

ATTORNEYS PRESENT FOR PLAINTIFF:
Edward M. Robbins, Jr. (AUSA)

ATTORNEYS PRESENT FOR INTERVENOR:
JOHN J. QUINN

PROCEEDINGS: Motion to Vacate Order of Production With Respect to Exhibits 5-K, 5-L, 5-O, 5-P, and 6-O

The motion to vacate the order of production with regard to certain exhibits is denied.

This matter was submitted on 8/26/91 for post-argument briefing by the parties. At that time, the court informed Intervenor that it needed authority that it could vacate an

order now final on the grounds alleged (that the circumstances on which the original order was based had now changed). Intervenor by subsequent brief has cited FRCP Rule 60(b)(5) and (6):

> "On motion . . . the court may relieve a party . . . from a final . . . order . . . for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. . . ."

The major reason given by Intervenor for the application is that the government has delayed years since it could have obtained the documents and that in the meantime circumstances have changed, as indeed they have since 1985 when the order was made.

The Intervenor's motion is based on an incorrect premises [sic]. The court stayed its production order "until decision on appeal or writ application is rendered." This must mean until the mandate is received. The mandate was received in January of this year. Thus there has not been the eons of delay postulated by Intervenor.

While the circumstances have changed (L. Ron Hubbard died in 1986, mooting any criminal investigation of him) the Court of Appeals in this case determined that such did not make this proceeding moot (*Zolin* 9 Cir '87 809 F.2d 1411, 1414). Thus, the argument that the circumstances have changed arguably qualifying this motion for consideration under Rule 60(b)(5) or (6) has no convincing force, even if not barred by "law of the case." Further, it is not a compelling argument that continued relitigation seemingly continuing forever can make a determination moot, so that the case starts all over and is never concluded. The court concludes that an "equitable" or other reason justifying relief is not present.

The motion is denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065; 85-6105
D.C. No. CV85-440-HLH

UNITED STATES OF AMERICA,
PETITIONER/APPELLEE/CROSS-APPELLANT

v.

FRANK S. ZOLIN, RESPONDENT/APPELLEE

AND

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD, INTERVENORS/APPELLANTS/CROSS-APPELLEES

OPINION

Argued and Submitted
November 6, 1986—Pasadena, California

Filed February 9, 1987

Before: JAMES R. BROWNING, Chief Judge, ALFRED T. GOODWIN AND JEROME FARRIS, Circuit Judges.

Opinion by Judge FARRIS

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

OPINION

FARRIS, Circuit Judge:

In July 1984, the Criminal Investigation Division of the IRS (Los Angeles District) began investigating L. Ron Hubbard's tax returns for the tax years 1979 through 1983. In October, the IRS served an administrative summons on the Clerk of the Los Angeles County Superior Court and requested that he produce certain documents relating to Hubbard's potential tax liability. (The Superior Court had obtained the documents in connection with an unrelated proceeding brought by the Church against a former member of the Church.) The Clerk willingly produced a number of documents, but refused to produce thirteen documents which had been ordered sealed by the Superior Court.

In January 1985, the Government initiated this action in an effort to compel the Clerk to produce the thirteen sealed documents. Shortly thereafter, the district court granted the motions to intervene which were brought by the Church and Mary Sue Hubbard. The Intervenors contended that each of the thirteen documents was either privileged, irrelevant, or both. They also argued that the summons was unenforceable because it was not issued pursuant to a "good faith" tax investigation.

Hearings were held in March and April. On April 30, 1985, the district court ruled that eight of the documents—exhibits 4-D, 4-E, 4-F, 4-G, 5-C, 5-G, 5-I, and 6-B—were irrelevant, privileged, or both, and did not need to be produced. It ruled that five documents—exhibits 5-K, 5-L, 5-O, 5-P, and 6-O—should be produced, but prohibited the IRS from disclosing them to another governmental agency except in connection with a criminal tax prosecution or with the court's approval. The court

further ruled that the Intervenors had failed to prove that the summons was not issued in "good faith."

The Intervenors filed timely notice of appeal on July 1, 1985. The Government filed timely notice of cross-appeal on July 15, 1985. The order appealed from is a final order which disposes of all claims of all parties. We have jurisdiction under 28 U.S.C. § 1291.

II. DISCUSSION

A. *Mootness*

On January 24, 1986, during the pendency of this appeal, L. Ron Hubbard died. The Intervenors argue that because Hubbard's death has foreclosed the possibility of any further investigation of Hubbard's potential criminal tax liability, this proceeding has become moot. We reject the argument for the reason stated in *United States v. Author Services,* 804 F.2d 1520, 1522 n.1 (9th Cir. 1986).

B. *Relevance of Exhibits 5-O, 5-P, and 6-O*

The IRS' power to examine records in connection with tax investigations is broadly construed. *See Liberty Financial Services v. United States,* 778 F.2d 1390, 1392 (9th Cir. 1985); *De Masters v. Arend,* 313 F.2d 79, 87 (9th Cir. 1963). The relevance of such evidence depends on whether it might throw light on the correctness of a taxpayer's returns. *United States v. Goldman,* 637 F.2d 664, 667 (9th Cir. 1980). The Government must demonstrate a "realistic expectation" of relevance, rather than an "idle hope" of relevance. *Id.* (quoting *United States v. Harrington,* 388 F.2d 520, 524 (2d Cir. 1969).

The Government bases its claims that the three exhibits are relevant on the declaration of Agent Petersell, in which Petersell stated:

> I have read the Petition to Enforce Internal Revenue Service Summons. Each of the items listed . . . is relevant to the investigation of L. Ron Hubbard in one or more of the following respects:
>
> A. Determining the extent to which income from the Church of Scientology inured to the benefit of L. Ron Hubbard.
>
> B. Determining whether L. Ron Hubbard conspired with others to impair and impede the Internal Revenue Service in the admiistration of the tax laws.
>
> C. Determining whether any violations of the Internal Revenue laws were done willfully with intent to evade tax.

The Government's other evidence of relevancy consists of three terse descriptions of the documents' contents in the petition for enforcement of the summons:

00000(5-0)	LRH note regarding the Mayor of Clearwater, Florida, 22 March 1978.
PPPPP (5-P)	LRH Statement regarding money from Scientology, 16 Feb. 1978.
000000(6-0)	LRH handwritten note regarding the Fair Game policy.

The record does not indicate the Government's sources for this information.

While the Government might have made a better showing, the district court did not clearly err in concluding that Petersell's declaration, when coupled with the general descriptions of the documents in the petition to enforce the summons, was sufficient to establish the relevance of the documents. We do not ignore our statement in *Goldman:*

> The Government's burden, while not great, is also not non-existent. The Government appears to argue that

the mere assertion of relevance by [an IRS agent] satisfied that burden. Even to the extent this might be true for records concerning the tax years being examined, relevance is not so clear when records for other years are sought.

Goldman, 637 F.2d at 667. Notwithstanding the fact that exhibits 5-O, 5-P, and 6-O all relate to years other than the tax years under investigation, we are satisfied that the district court, after balancing the indicia of relevancy against the impossibility of fully knowing the documents' contents before an actual review, did not clearly err in determining that the documents "might throw light" on the correctness of L. Ron Hubbard's return information.

C. *Waiver of Privilege As to Exhibits 5-K and 5-L*

The Intervenors do not contest on appeal the relevance of exhibits 5-K and 5-L. Instead, they contend that the district court erred in ruling that privileges which might otherwise have applied to the two documents were waived by a voluntary delivery of the documents to Gerald Armstrong. In addition, they argue that the district court erred when it concluded that exhibit 5-L would not be protected by the attorney-client privilege even in the absence of waiver because the affidavit of Hubbard's former attorney was too vague and conclusory to validly assert the privilege.

The attorney-client privilege is to be strictly construed *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). *See* 8 J. Wigmore, *Evidence* § 2291 at 554 (McNaughton rev. 1961). The logic behind the strict construction of the attorney-client privilege applies with equal force to the marital communications privilege: like the attorney-client privilege, the marital communications privilege is "an obstacle to the

investigation of the truth. . . . [that] ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." *Id.* The burden of demonstrating the existence of an evidentiary privilege rests on the party asserting the privilege. *See United States v. Gann*, 732 F.2d 714, 723 (9th Cir. 1984) (attorney-client privilege); *Weil*, 647 F.2d at 25 (evidentiary privileges generally). In order to establish the applicability of the attorney-client privilege to a given communciation, the party asserting the privilege must affirmatively demonstrate non-waiver. *See id.; United States v. Landof*, 591 F.2d 36, 38 (9th Cir. 1978).

The voluntary delivery of a privileged communication by a holder of the privilege to someone not a party to the privilege waives the privilege. *See Clady v. County of Los Angeles*, 770 F.2d 1421, 1433 (9th Cir. 1985) (the voluntary disclosure of a privileged attorney-client communication constitutes waiver); *United States v. McCown*, 711 F.2d 1441, 1452-53 (9th Cir. 1983) (the marital communications privilege is inapplicable to communications not intended to remain confidential); *Weil*, 647 F.2d at 24 (the voluntary disclosure of a privileged attorney-client communication constitutes waiver). Moreover, when the disclosure of a privileged communication reaches a certain point, the privilege may become extinguished even in the absence of a wholly voluntary delivery. *See In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) ("Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the privilege."). Whether the circumstances of the delivery of exhibits 5-K and 5-L to Armstrong gave rise to a waiver of the otherwise applicable privileges is a mixed question of law and fact that we review *de novo*. *See United States v. McConney*, 728 F.2d 1195, 1199-1204 (9th Cir. 1984) (en banc).

The district court held that all privileges potentially applicable to exhibits 5-K and 5-L were waived by a voluntary delivery of the documents to Gerald Armstrong. We agree. The Intervenors argue that the delivery could not have been voluntary since the correspondence between Armstrong and Hubbard contains no express indication that Armstrong intended to, or had Hubbard's permission to, collect communications between Hubbard and his wife or between Hubbard and his attorneys.

Although Hubbard did not explicitly grant Armstrong access to attorney-client or marital communications, Hubbard did, in a memorandum to Armstrong, grant Armstrong general permission to collect documents relevant to the proposed biography of Hubbard. The Intervenors' only argument in support of non-waiver is that Hubbard did not specifically grant Armstrong access to attorney-client and marital communications. More is required.

Since the attorney-client privilege which might otherwise have attached to exhibit 5-L was waived, we need not consider whether the attorney-client privilege was validly asserted by Hubbard's former attorney.

D. ***Limited Evidentiary Hearing***

We review for abuse of discretion. *See United States v. Stuckey*, 646 F.2d 1369, 1373 (9th Cir. 1981). *See generally Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984) (a district court's decisions relating to discovery matters are reviewed for abuse of discretion).

The purpose of the limited evidentiary hearing was to determine whether the summons enforcement proceeding was legitimate and in "good faith," rather than merely camouflage for an ulterior non-tax motive. The "good faith" standard seeks to prevent the IRS from becoming an information-gathering agency for other governmental

agencies. *See United States v. LaSalle National Bank*, 437 U.S. 298, 317 (1978); *Stuckey*, 646 F.2d at 1373. The task is to identify " 'those rare cases where bald allegations of harassment or improper purpose can be substantiated.' " *Author Services*, 804 F.2d at 1523 (quoting *United States v. Church of Scientology of California*, 520 F.2d 818, 824 (9th Cir. 1975)). The focal issue is whether an IRS investigation is motivated by legitimate tax purposes. *See United States v. Powell*, 379 U.S. 48, 57-58 (1964). The district court may properly limit evidentiary hearings on the "good faith" issue to prevent a frustration of legitimate Government objectives. *Church of Scientology*, 520 F.2d at 823-25.

The Intervenors argue that the district court improperly limited its inquiry to the issue of whether the summons itself was issued in "good faith," and ignored and larger issue of whether the overall investigation was in "good faith." We reject the argument. At the hearing, C. Phillip Xanthos, the Branch Chief of the IRS Criminal Investigation Division (Los Angeles District), specifically testified as to the legitimate tax-determination objectives of the investigation. This and other testimony was sufficient to support the district court's finding that the summons was issued in "good faith." *See LaSalle National Bank*, 437 U.S. at 317. *See also Stuckey*, 646 F.2d at 1376; *United States v. Zack*, 521 F.2d 1366, 1368-69 (9th Cir. 1975).

E. *Restrictions on IRS Disclosure of the Summoned Documents*

The district court ordered that "the documents produced in response to the summons shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained." We review the district court's order for abuse

of discretion. *See United States v. Columbia Broadcasting System*, 666 F.2d 364, 368 (9th Cir. 1982).

The Government argues that the district court's order conflicts with the disclosure provisions of 26 U.S.C. § 6103. Those provisions, the Government suggests, are the exclusive limitations upon IRS disclosure of return information. In addition, the Government argues that the order represents an improper attempt to enjoin the IRS from obeying a duly enacted federal law.

We recently rejected this argument in *Author Services*, and held that a district court's order restricting the IRS' ability to disclose summoned materials to other governmental agencies, "[r]ather than being an abuse of discretion, . . . [could] be a wise exercise of control." *Author Services*, 804 F.2d at 1526. The district court's order in this case created a mechanism whereby the district court could monitor the IRS' use of the summoned documents. This is an appropriate exercise of the district court's discretion: "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." *Powell*, 379 U.S. at 58. *See S.E.C. v. ESM Government Securities, Inc.*, 645 F.2d 310, 316-17 (5th Cir. 1981). A district court may, when appropriate, condition enforcement of a summons on the IRS' agreeing to abide by disclosure restrictions. *Author Services*, 804 F.2d at 1525 (citing *United States v. Texas Heart Institute*, 755 F.2d 469, 481 (5th Cir. 1985)).

The Intervenors also argue that the district court's order violates 26 U.S.C. § 7421(a) (the "Anti-Injunction Act"), because it has the effect of enjoining the IRS from disclosing the summoned tax information. We reject the argument for the reasons stated in *Author Services*, 804 F.2d at 1526.

F. *Exhibit 5-C ("the Tapes")*

The district court's rulings on the scope of the attorney-client privilege involve mixed questions of law and fact, and are reviewable *de novo*. *See McConney*, 728 F.2d at 1202. Where the relevant scope of the attorney-client privilege is clear and the decision that the district court must make is essentially factual, however, the district court's rulings as to the privilege are reviewed for clear error. *Id.* at 1200.

The Government contends that the district court erred in finding that the "common interest" rule covered the tapes. The "common interest" rule protects communications made when a nonparty sharing the client's interests is present at a confidential communication between attorney and client. The paradigm case is where two or more persons subject to possible indictment arising from the same transaction make confidential statements that are exchanged among their attorneys. *See Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965).

The Government is incorrect, however, in arguing that the "common interest" rule is limited to such a case. Even where the non-party who is privy to the attorney-client communications has never been sued on the matter of common interest and faces no immediate liability, it can still be found to have a common interest with the party seeking to protect the communications. *See Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 44-45 (D. Md. 1974); *Stanley Works v. Haeger Potteries, Inc.*, 35 F.R.D. 551, 554-55 (N.D. Ill. 1964).

The district court found that the parties present at the meetings recorded on the tapes "had a common interest" in sorting out the respective affairs of the Church and Mr. Hubbard. We agree. All of the non-lawyers present at the meeting were employees of the Church.

The Government also challenges the district court's finding that the Church did not waive its attorney-client privilege when it inadvertently delivered the tapes to Armstrong. (Hubbard's personal secretary gave Armstrong the tapes under the mistaken impression that they were blank.) In *Transamerica Computer Co., Inc. v. International Business Machines, Corp.*, 573 F.2d 646 (9th Cir. 1978), we held that whereas a waiver of the attorney-client privilege occurs when a holder of the privilege voluntarily discloses the privileged matter, no waiver occurs if the holder has no opportunity to claim the privilege or if the holder was erroneously compelled to disclose the privileged matter. *Id.* at 651. The secretary's delivery of the tapes to Armstrong was sufficiently involuntary and inadvertent as to be inconsistent with a theory of waiver.

The Government challenges the district court's ruling that the "crime-fraud" exception to the attorney-client privilege did not apply to the tapes. The attorney-client privilege does not protect communications that further a crime or fraud. *See United States v. Hodge and Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977). The Government had the burden of making a prima facie showing that the attorney-client communications recorded on the tapes were in furtherance of an intended or present illegality. *Id.* We agree with the district court's conclusion that the Government failed to satisfy this burden.

The Intervenors argue that the Government's evidence of crime or fraud must come from sources independent of the attorney-client communications recorded on the tapes. In support of this argument, they cite *United States v. Shewfelt*, 455 F.2d 836 (9th Cir. 1972). In *Shewfelt*, we said that "before the privileged status of [attorney-client] communications can be lifted, the government must first establish a prima facie case of fraud *independently* of said communications." *Id.* at 840 (emphasis added). Notwith-

standing *Shewfelt*, the Government argues that in assessing the applicability of the "crime-fraud" exception to the tapes the district court should have considered evidence of the contents of the tapes which the Government presented to the court.

Shewfelt's independent evidence requirement has been strongly criticized. In *In re Berkley and Co., Inc.*, 629 F.2d 548, 553 n.9 (8th Cir. 1980), the Eighth Circuit observed that the two cases cited in *Shewfelt*, assertedly in support of the independent evidence requirement, in fact simply state that a party seeking disclosure under the "crime-fraud" exception must make a prima facie showing of crime or fraud in order to shift the burden of showing the inapplicability of the exception to the party resisting disclosure.

In the fourteen years that have passed since *Shewfelt* was decided, only one court has cited it as authority for the independent evidence requirement. *See Kockums Industries Limited v. Salem Equipment, Inc.*, 561 F. Supp. 168, 171 (D. Ore. 1983). By contrast, a number of courts have rejected the *Shewfelt* position. *See, e.g., In re Sealed Case*, 676 F.2d at 815; *In re Special September 1978 Grand Jury*, 640 F.2d 49, 59 (7th Cir. 1980); *In re Berkley*, 629 F.2d at 553 n.9; *Coleman v. American Broadcasting Companies, Inc.*, 106 F.R.D. 201, 207 n.9 (D.D.C. 1985); *United States v. King*, 536 F. Supp. 253, 262 (C.D. Cal. 1982).

In *Hodge and Zweig*, we discussed the "crime-fraud" exception at length without ever referring to *Shewfelt*. 548 F.2d at 1354-55. Instead, we cited repeatedly to *United States v. Friedman*, 445 F.2d 1076 (9th Cir. 1971), a decision which implicitly recognized that a district court may examine the disputed communications themselves in order to determine the applicability of the "crime-fraud" exception. *Id.* at 1354.

In this case, the communications recorded on the tapes appear to be the Government's best evidence establishing the applicability of the "crime-fraud" exception. This is not surprising, since the illegal advice allegedly given by Church attorneys to Church officials is an integral part of the intended illegality that the Government seeks to establish. In this connection, the court's observation in *King* is pertinent: "[S]ince the illegal advice is usually given in the attorney-client setting, applying *Shewfelt* to such cases would, in most instances, simply serve to insulate dishonest attorneys from prosecution for obstruction of justice." *King*, 536 F. Supp. at 262.

In *King*, the court speculated that "the independence test set forth in *Shewfelt* does not appear to be the law in the Ninth Circuit." *Id.* We cannot agree. Whatever the merits of the criticisms that have been leveled against *Shewfelt*'s independent evidence requirement, we are bound to adhere to our holding in *Shewfelt* unless and until it is reversed by an *en banc* panel of this court. *See United States v. Spilotro*, 800 F.2d 959, 967 (9th Cir. 1986); *Atonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120, 1132 n.6 (9th Cir. 1985).

The Government's independent evidence of intended illegality consists primarily of: 1) Agent Petersell's Supplemental Declaration of March 8, 1985, in which Petersell stated that his discussions with Gerald Armstrong had given him reason to believe that the communications recorded on the tapes focused generally on the intentional violation of the tax laws; and 2) Petersell's Supplemental Declaration of March 15, 1985, in which Petersell stated that his discussions with three other former Church employees had given him reason to believe that the communications recorded on the tapes specifically focused on i) a proposed scheme whereby the Church's cash transfers to Hubbard would be disguised as payments for services

rendered (allegedly to insulate Hubbard from tax liability and to protect the Church's tax-exempt status), and ii) a proposed scheme whereby Hubbard would be able to control royalty income derived from the "Trademark Trust" (a trust that was created to manage Hubbard's various Scientology-related and other trademarks) without that control being traceable to him.

We agree with the district court that this evidence, while not altogether insubstantial, is not sufficient to make out the requisite prima facie showing of intended illegality.

AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 85-0440-HLH

UNITED STATES OF AMERICA, PETITIONER

vs.

FRANK S. ZOLIN, CLERK OF THE SUPERIOR COURT, RESPONDENT

CHURCH OF SCIENTOLOGY OF CALIFORNIA, INTERVENOR

[Filed Apr. 30, 1985]

ORDER

The Court makes the following Orders and Findings:

1. Reconsideration is denied as to Exhibits 5G and 5I; the Order of March 12, 1985 will stand.

2. Intervenor Church has failed to raise any doubt of the good faith of the Internal Revenue Service in pursuing this summons enforcement proceeding. Specifically, it is found that a bona fide criminal tax investigation of L. Ron Hubbard is being conducted by the IRS for the years 1979-83, that the matter has not been referred to the Department of Justice for prosecution, that the summons was validly issued pursuant to that investigation, that the agent issuing the summons was in good faith in doing so, and did not do so for an improper purpose, or to harass the taxpayer, or for a collateral purpose. No further discovery on this issue is warranted.

3. With the exception of Exhibits 6B and 5C (the "MCCS tapes"), the Court finds that all potentially applicable privileges (attorney-client, marital) have been waived by voluntary delivery of the material to Gerald Armstrong. In addition, no privilege has been validly asserted by the holder of a potential privilege as to certain items (Exhibits 5L and 5P).

4. Sufficient relevancy being shown, the IRS is entitled to inspect and copy Exhibits 5K, 5L, 5O, 5P and 60, and the summons is to be enforced as to those items.

5. No relevancy or waiver has been shown for Exhibit 6B, and it need not be produced.

6. As to Exhibit 5C (the "MCCS tapes"), the Court finds:

(a) The tapes consist of confidential communications between attorneys and clients or clients' authorized agents.

(b) The confidential communications were between clients and their attorneys who had a common interest; the privilege was, therefore, not destroyed by publication of the communication to an outsider.

(c) There was no waiver of the privilege by delivery to an outsider, the Court finding that the tapes were delivered to Gerald Armstrong by mistake, and, in addition, that Petitioner has not carried the burden of showing waiver.

(d) The "fraud-crime" exception to the attorney-client privilege does not apply. The quoted excerpts tend to show or admit past fraud but there is no clear indication that future fraud or crime is being planned.

(e) The Order sealing the Petersell affidavit (filed March 15, 1985) quoting excerpts from the tapes will remain sealed.

(f) This Court's copy of the tapes will remain sealed in possession of the Court's Clerk until after any appellate

review of this Order, after which it is to be returned to the Superior Court. The Clerk of the Superior Court need not produce its copy of the tapes pursuant to the summons.

7. The documents delivered hereunder shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained.

Petitioner is to prepare an Order in accord with this Order and the Order of March 12, 1985. This Order is stayed for sixty (60) days, and thereafter if an appeal or application for a writ is filed and until decision on appeal or writ application is rendered.

IT IS SO ORDERED.

DATED: April 30, 1985.

/s/ HARRY L. HUPP

HARRY L. HUPP
United States District Judge

Supreme Court, U.S.
FILED
JUL 2 1992
OFFICE OF THE CLERK

(2)

No. 91-1766

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHURCH OF SCIENTOLOGY OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA AND FRANK S. ZOLIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an appeal from an order enforcing an administrative summons becomes moot when the materials sought by the summons have been produced pursuant to the order.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) dismissing the appeal as moot is unreported. The order entered by the district court (Pet. App. 2a-3a) on September 4, 1991, is unreported. The prior opinion of the court of appeals (Pet. App. 4a-17a) is reported as *United States* v. *Zolin*, 809 F.2d 1411.[1] The prior order of the district court (Pet. App. 18a-20a) entered on April 30, 1985, is unreported.

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[1] The court of appeals' decision was subsequently affirmed in part and reversed in part on other issues by this Court. *United States* v. *Zolin*, 491 U.S. 554 (1989). The opinion of the court of appeals following remand from this Court is reported at 905 F.2d 1344 (9th Cir. 1990), cert. denied, 111 S. Ct. 1309 (1991).

JURISDICTION

The order of the court of appeals was entered on January 31, 1992. The petition for a writ of certiorari was filed on April 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1984, the Internal Revenue Service (IRS) commenced an investigation of the tax returns of L. Ron Hubbard, founder of petitioner (the Church of Scientology), and others, for tax years 1979-1983. In July of 1984, Los Angeles newspapers reported that former Church of Scientology officials had testified in a state court action in California that millions of dollars had been transferred to Hubbard in the late 1970's and early 1980's from various Scientology entities. See *Church of Scientology* v. *Armstrong*, No. C 420 153 (Cal. Super. Ct.). As part of its investigation, the IRS served an administrative summons on the Clerk of the Los Angeles County Superior Court seeking certain material contained in the record of the *Armstrong* case.[2] The Clerk's Office, however, refused to produce 13 documents that had been ordered sealed by the Superior Court, including the five exhibits at issue here (Exhs. 5-O, 5-P, 6-O, 5-K, 5-L) and another exhibit (Exh. 5-C) at issue in a related case. See *Church of Scientology* v. *United States*, cert. granted, No. 91-946 (Mar. 2, 1992).

The IRS then brought this proceeding in federal district court to enforce its administrative summons. See *United States* v. *Zolin*, 491 U.S. 554, 557-558 (1989). Peti-

[2] The Internal Revenue Service is authorized to issue summonses to obtain production of "any books, papers, records, or other data" that "may be relevant" in "determining the liability of any person for any internal revenue tax" (26 U.S.C. 7602(a)(1)). The district courts have jurisdiction to enforce compliance with these administrative summonses. 26 U.S.C. 7402(b), 7604(a).

tioner and Mary Sue Hubbard intervened to oppose production of the sealed documents. In particular, petitioner argued that Exhibits 5-O, 5-P, and 6-O were not relevant to the tax investigation and that Exhibits 5-K and 5-L were subject to certain privileges, including the attorney-client privilege. Petitioner also argued that sealed Exhibit 5-C, which contains tape recordings of two meetings between various attorneys and representatives of L. Ron Hubbard and the Church of Scientology (known as the MCCS tapes) was protected by the attorney-client privilege. *United States* v. *Zolin*, 491 U.S. at 557-558.

After oral argument and an evidentiary hearing, the district court ruled that the five exhibits at issue—Exhibits 5-K through 6-O—were relevant to the tax investigation and that any privileges had been waived (Pet. App. 19a). The court ordered these five documents to be produced, but prohibited the IRS from disclosing them to another governmental agency, except in connection with a criminal tax prosecution or with the court's prior approval (*id.* at 19a-20a).[3] The district court also ruled that Exhibit 5-C, the MCCS tapes, contained confidential attorney-client communications, that the privilege had not been waived, and that the crime-fraud exception to the attorney-client privilege did not apply (*id.* at 19a; 491 U.S. at 559). Finally, the district court stayed enforcement of its ruling "for sixty (60) days, and thereafter if an appeal or application for a writ is filed and until decision on appeal or writ application is rendered" (Pet. App. 20a). Both petitioner and the government appealed.

[3] The court of appeals (Pet. App. 11a-12a) subsequently upheld this restriction on the disclosure of the summoned documents to other governmental agencies and this Court affirmed its judgment on that issue by an equally divided Court (*Zolin*, 491 U.S. at 561). That aspect of the district court's order is not now before the Court.

2. The court of appeals affirmed the district court's enforcement order. *United States* v. *Zolin*, 809 F.2d 1411 (9th Cir. 1987).[4] The court of appeals ruled that the district court did not err in determining that Exhibits 5-O, 5-P and 6-O were relevant to the tax investigation and that all privileges potentially applicable to Exhibits 5-K and 5-L had been waived (Pet. App. 6a-10a). Finally, with respect to the MCCS tapes, the court of appeals affirmed the district court's rulings, including its ruling that the crime-fraud exception to the attorney-client privilege was not applicable to that document (*id.* at 13a-17a).

3. Petitioner sought no further review of the judgment affirming the order enforcing the summons as to the five exhibits at issue here. The government, however, did file a certiorari petition and review was granted by this Court. In its opinion entered on June 21, 1989, this Court held that the allegedly privileged materials reflected on the MCCS tapes may be reviewed *in camera* to determine whether they fall within the crime-fraud exception to the attorney-client privilege. *United States* v. *Zolin*, 491 U.S. at 562-575. See also note 3, *supra*. The Court concluded that such *in camera* review is proper when the requesting party has presented relevant, nonprivileged evidence that establishes "a reasonable belief that *in camera* review may yield evidence that establishes" the applicability of the crime-fraud exception. 491 U.S. at 574-575.

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[4] On January 24, 1986, during the pendency of the appeal, L. Ron Hubbard died. The court of appeals in *Zolin*, however, rejected petitioner's suggestion of mootness because the investigation entailed civil elements which survived Mr. Hubbard's death. See 809 F.2d at 1414 (adopting the reasoning stated in *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1522 n.1 (9th Cir. 1986)) (Pet. App. 6a). See also *United States* v. *Zolin*, 491 U.S. at 557 n.3 ("We are satisfied that a live controversy remains.").

On remand, the court of appeals examined the partial transcripts of the MCCS tapes, together with other independent evidence, and concluded that there was sufficient evidence of intended illegality to establish that the tapes were within the scope of the crime-fraud exception. *United States* v. *Zolin*, 905 F.2d 1344 (9th Cir. 1990). The court of appeals denied petitioner's petition for rehearing on September 19, 1990, and this Court denied petitioner's certiorari petition on March 18, 1991. *Church of Scientology* v. *United States*, 111 S. Ct. 1309.

Following the denial of petitioner's certiorari petition and receipt of the court of appeals' mandate, the district court entered an order on April 15, 1991, requiring that the MCCS tapes be delivered to the IRS. The district court, the court of appeals and this Court subsequently denied requests for stays pending appeal by petitioner. Copies of the MCCS tapes were then released to the IRS. On September 10, 1991, the court of appeals dismissed petitioner's appeal as moot. This Court granted petitioner's certiorari petition on March 2, 1992. *Church of Scientology* v. *United States*, No. 91-946.

4. In the meantime, on June 19, 1991, the government moved the California Superior Court for an order allowing the government to examine and copy the remaining five exhibits ordered to be released by the district court's enforcement order of April 30, 1985. On July 25, 1991, petitioner filed a motion in the district court to vacate that portion of the district court's enforcement order which had granted the government access to these five exhibits.[5]

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[5] In that motion, petitioner argued that the government had no need for the documents because it had waited for four years before attempting to obtain them. The government noted that petitioner's argument was simply an attempt to relitigate the arguments that had been specifically rejected by the court of appeals and this Court (see *Zolin*, 809 F.2d at 1414; 491 U.S. at 557 n.3).

On September 4, 1991, the district court denied petitioner's motion to vacate the order of production with respect to Exhibits 5-K through 6-O (Pet. App. 2a-3a). The district court noted that it had stayed its production order until the mandate of the court of appeals was received. Since the mandate was not received until January of 1991, the court accordingly concluded that there "has not been the eons of delay postulated" by petitioner (*id.* at 3a). The court also noted there was no "equitable" or "other reason justifying relief" under Rule 60(b) (Pet. App. 3a). Petitioner filed a notice of appeal on September 9, 1991.

On September 19, 1991, the court of appeals denied petitioner's motion for a stay pending appeal. The five exhibits were then released to United States Attorney for copying, and those copies were delivered to the Internal Revenue Service for its review. On January 31, 1992, the court of appeals granted the government's motion to dismiss petitioner's appeal as moot (Pet. App. 1a).

DISCUSSION

In our view, the court of appeals' decision is correct. Since the five exhibits requested by the IRS summons have been produced, petitioner's continued opposition to enforcement of the summons is moot. The "case" or "controversy" that is required to support the exercise of jurisdiction by an Article III court "must concern the subject matter of the action" over which the court has subject matter jurisdiction. *United States* v. *Kis*, 658 F.2d 526, 533 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982). The subject matter of a summons enforcement action, and the subject matter jurisdiction of the federal courts under 26 U.S.C. 7402(b), 7604(a), is limited to determining whether "to compel * * * production" of the requested information. Once, as in this case, production has occurred, the only issue for which subject matter ju-

risdiction exists under the statute—whether production should be compelled—has become moot. Because that was the only issue the federal courts had jurisdiction to determine in the summons enforcement proceeding, any further opinion that the courts might render in this proceeding would be advisory in nature. The court of appeals therefore properly dismissed the appeal as moot.

Nevertheless, the issue raised by petitioner in the instant petition is identical to the issue raised by petitioner in *Church of Scientology* v. *United States*, cert. granted, No. 91-946 (Mar. 2, 1992). Consideration of this petition should therefore be deferred pending this Court's decision in No. 91-946.[6]

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[6] As in No. 91-946, this case comes before the Court in an unusual procedural context. The question that petitioner seeks to litigate here—whether the five exhibits requested by the IRS summons should be produced—has been fully adjudicated and finally decided adversely to petitioner. See *United States* v. *Zolin*, 905 F.2d 1344 (9th Cir. 1990), cert. denied, 111 S. Ct. 1309 (1991); *United States* v. *Zolin*, 809 F.2d 1411 (9th Cir. 1987) (Pet. App. 6a-10a). To implement that final judgment, the United States applied to the district court for an order directing production of the requested documents. The district court issued the requested order, rejecting petitioner's attempt at "continued relitigation seemingly continuing forever" (Pet. App. 3a). Petitioner nonetheless appealed the order entered by the district court, again seeking to relitigate the merits of the judgment entered by the court of appeals with respect to production of the five documents at issue. Since that judgment has long been final, this case may properly be disposed of upon this independent ground.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in No. 91-946 and disposed of as appropriate in light of this Court's disposition of No. 91-946.

Respectfully submitted.

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JULY 1992